

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01144-COA

CORNELIUS BADY

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT:	6/21/2007
TRIAL JUDGE:	HON. SHARION R. AYCOCK
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	CORNELIUS BADY (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DESHUN TERRELL MARTIN
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	POST-CONVICTION RELIEF DENIED
DISPOSITION:	REVERSED AND REMANDED – 07/01/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE MYERS, P.J., IRVING AND ISHEE, JJ.

IRVING, J., FOR THE COURT:

¶1. After pleading guilty to one felony count of receiving stolen property, Cornelius Bady filed a motion for post-conviction relief (PCR) with the Lee County Circuit Court.¹ The circuit court denied the motion. Aggrieved, Bady appeals and asserts (1) that the court erred in failing to inform him of his right to appeal his sentence, (2) that the court erred in failing to find the indictment defective, (3) that he received ineffective assistance of counsel, (4) that the court erred in sentencing him for a felony rather than a misdemeanor, (5) that his guilty plea was not knowingly and intelligently entered, (6) that the court erred in finding the affidavit for the search warrant sufficient,

¹ In actuality, Bady filed a motion to vacate and set aside his conviction and sentence; however, the court considered the motion as one for post-conviction relief.

and (7) that the search was illegal because the officers failed to produce the search warrant prior to searching his residence.

¶2. Finding error, we reverse the judgment of the circuit court denying post-conviction relief and remand this case for further proceedings consistent with this opinion.

FACTS

¶3. In October 2005, Bady was indicted for a felony charge of receiving stolen property. The indictment charged Bady with “willfully, unlawfully, and feloniously and knowingly” receiving, possessing, retaining, or disposing of a television valued at more than \$500. On May 30, 2006, Bady pleaded guilty and was sentenced to six years in the custody of the Mississippi Department of Corrections. Thereafter, Bady filed a PCR motion to which he attached a copy of a receipt for the television which established that it was purchased in August 2003 for \$349.99. The receipt also indicated that in addition to the television a forty-eight month warranty was purchased for \$159.99, which brought the price of both items to \$546.65 after sales tax was added to the subtotal. In his motion, Bady claimed that his attorney was ineffective for allowing him to plead guilty to a felony when he had in fact committed a misdemeanor. The court denied Bady’s request for relief without mentioning or addressing the receipt which established that the value of the television on the date of purchase did not exceed five hundred dollars. The court simply found that he “failed to demonstrate a deficiency in his counsel’s performance and any prejudicial effect such performance had on [his] defense.”

ANALYSIS AND DISCUSSION OF THE ISSUE

¶4. We only address the merits of Bady’s ineffective assistance of counsel claim, as we find that his other issues are either without merit or are subsumed in his ineffective assistance of counsel claim. The State, relying on *Horton v. State*, 584 So. 2d 764, 767 (Miss. 1991), contends that Bady

is not entitled to any relief because he failed to present a claim that is “procedurally alive substantially showing denial of a state or federal right.”

¶5. We disagree, as it appears to us that Bady was denied his right to effective assistance of counsel guaranteed to him by the Sixth Amendment to the United States Constitution. We base our decision on the fact that Bady’s attorney represented him as he pleaded guilty to felonious receipt of stolen property when it appears that Bady’s actions only rose to the level of misdemeanor receipt of stolen property. Mississippi Code Annotated section 97-17-70(5) (Supp. 2007) clearly provides that:

Any person who shall be convicted of receiving stolen property which does not exceed Five Hundred Dollars (\$500.00) in value shall be punishable by imprisonment for not more than six (6) months or by a fine of not more than One Thousand Dollars (\$1,000.00), or both.

(Emphasis added). Bady was convicted and sentenced under Mississippi Code Annotated section 97-17-70(4) (Supp. 2007) which provides that:

Any person who shall be convicted of receiving stolen property which exceeds Five Hundred Dollars (\$500.00) in value shall be committed to the custody of the State Department of Corrections for a term not exceeding ten (10) years or by a fine of not more than Ten Thousand Dollars (\$10,000), or both.

(Emphasis added).

¶6. As stated, Bady attached to his PCR motion a copy of a receipt purporting to be the original sales receipt for the stolen television. No one questioned the authenticity of the receipt, but we cannot be sure, based on the record before us, that the receipt is genuine, although it appears to be. If the receipt is an authentic copy of the sales receipt for the television, we find that Bady likely received ineffective assistance of counsel, as his guilty plea was not part of a plea deal. Therefore, we reverse and remand this case to the circuit court for an evidentiary hearing for the purpose of determining the authenticity of the receipt and any other matters that may bear upon the question of whether Bady was aware, at the time of his plea, that the value of the television was below five

hundred dollars. As previously stated, it appears that the television was purchased for \$349.99 and the warranty was purchased for \$159.99. Thus, if the receipt that is in the record is authentic, the television alone was never worth more than five hundred dollars. Moreover, even if the price of the warranty should be considered as part of the value of the television, it can hardly be argued that the television was worth five hundred dollars when Bady came into possession of it because at that time the television was almost two years old. Bady's attorney should have realized that there was an insufficient factual basis for allowing his client to plead guilty to felony possession. Unless Bady's attorney on remand can produce a good reason, which is not readily apparent to us, for allowing his client to plead guilty to a felony on the facts of this case, the attorney's conduct was clearly deficient. It necessarily follows that but for this deficiency Bady would not have been convicted of felony possession of stolen property. We conclude that Bady's PCR motion was sufficient to justify an evidentiary hearing. Therefore, we reverse and remand this case for further proceedings consistent with this opinion.²

¶7. THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LEE COUNTY.

KING, C.J., LEE AND MYERS, P.JJ. BARNES, ISHEE AND ROBERTS, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CHANDLER AND GRIFFIS, JJ.

CARLTON, J., DISSENTING:

¶8. This Court will not reverse a trial court's decision to deny a motion for post-conviction relief unless the trial court's decision was clearly erroneous. *Smith v. State*, 806 So. 2d 1148, 1150 (¶3)

² As noted, one of Bady's issues is that the circuit court should have sentenced him for misdemeanor possession of stolen property. If on remand the circuit court determines that the receipt is authentic and that Bady was not aware at the time of his plea that his conduct did not rise to the level of felony possession of stolen property, the court may, in its discretion, dispense with an evidentiary hearing and resentence Bady for misdemeanor possession of stolen property.

(Miss. Ct. App. 2002). “In order to prevail on the issue of whether his defense counsel’s performance was ineffective, [Bady] must prove that his counsel’s performance was deficient and that he was prejudiced by counsel’s mistakes.” *Kinney v. State*, 737 So. 2d 1038, 1041 (¶8) (Miss. Ct. App. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984)). The test set forth in *Strickland* to determine whether the defendant has received ineffective assistance of counsel applies to challenges to guilty pleas as well. *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). Because I do not find that Bady has met the burden imposed by *Strickland* to show that he received ineffective assistance of counsel, I respectfully dissent.

¶9. An inmate asserting a claim of ineffective assistance of counsel is required to “allege[] with specificity and detail” the facts which show the attorney’s deficient performance and the prejudice to the inmate caused by the deficient performance. *Kinney*, 737 So. 2d at 1041 (¶8) (citing *Cole v. State*, 666 So. 2d 767, 777 (Miss. 1995)). Furthermore, “[t]here is a strong but rebuttable presumption that counsel’s conduct fell within the wide range of reasonable professional assistance.” *Id.* (citing *Moody v. State*, 644 So. 2d 451, 456 (Miss.1994)). Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

¶10. Because our standard of review is limited, I would defer to the trial court’s findings related to Bady’s ineffective assistance of counsel claim. The record on a guilty plea proceeding is limited, and we cannot determine factors that may have led Bady’s counsel to allow the guilty plea without objection to the indictment. Further, Bady has not overcome the presumption that his counsel’s advice and performance were the result of sound trial strategy. *Hall v. State*, 735 So. 2d 1124, 1127

(¶7) (Miss. Ct. App. 1999) (citing *Strickland*, 466 U.S. at 686).

¶11. We lack sufficient information in this case to distinguish trial strategy from ineffective assistance of counsel; therefore, Bady cannot overcome the presumption that his counsel was effective. The value of the property received by Bady would have been a question of fact for the jury had he gone to trial. *Williams v. State*, 763 So. 2d 186, 188 (¶7) (Miss. Ct. App. 2000) (quoting *Barry v. State*, 406 So. 2d 45, 47 (Miss. 1981)). “In the ordinary case, the proper yardstick is the market value of the property at the time and place of the larceny; the original cost of the property or any special value to the owner personally is not considered.” *Id.* (quoting *Barry*, 406 So. 2d at 47). Bady has not presented any evidence to show the market value of the television at the time he took possession of it. What he does present is a receipt for the original purchase of the television and warranty. The value of that transaction as a whole was \$546.65.

¶12. To satisfy the second prong of the *Strickland* analysis, Bady must show that his counsel’s deficiencies prejudiced him. *Kinney*, 737 So. 2d at 1041 (¶8). Therefore, Bady must show a reasonable probability that, but for his counsel’s errors, a different outcome would have resulted at trial. *Hall*, 735 So. 2d at 1127 (¶7) (citing *Strickland*, 466 U.S. at 694). I do not find this burden to be met. “A ‘reasonable probability’ is one sufficient to undermine confidence in the outcome of the proceeding.” *Id.* I am confident that Bady has not been prejudiced by his counsel’s performance. This Court must “consider the totality of the circumstances in order to determine whether counsel’s actions were both deficient and prejudicial.” *Id.* at 1126-27 (¶5). Had Bady chosen to go to trial, it is possible that the State could have proven the value of the television to be \$500, and it is possible that he would have been convicted. Because a felony conviction of receiving stolen property carries the possibility of a ten-year sentence in the custody of the Mississippi Department of Corrections, Bady’s six-year sentence was relatively lenient. Further, the record shows that Bady’s sentence for

receiving stolen property is being served concurrently with a six-year sentence for possession of cocaine, sentences that the trial judge ordered Bady to serve consecutive to another sentence he was already serving. Bady pleaded guilty to receiving stolen property at the same time he pleaded guilty to the drug charge, and it is clear from the plea hearing transcript that Bady's counsel and the prosecutor discussed sentencing before Bady entered his plea.

¶13. Considering the totality of the circumstances, the decision to allow Bady to plead guilty without questioning the value of the television can easily be characterized as a strategic decision. Again, on appeal, “[t]his Court will only under exceptional circumstances, second guess counsel on matters of trial strategy.” *Hill v. State*, 850 So. 2d 223, 226 (¶14) (Miss. Ct. App. 2003) (citing *Marshall v. State*, 759 So. 2d 511 (¶11) (Miss. Ct. App. 2000)). Because I do not find that Bady has proven both deficient performance of his counsel and prejudice as a result of the deficient performance, I would affirm the judgment of the trial court.

CHANDLER AND GRIFFIS, JJ., JOIN THIS OPINION.